

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

J.A. CROSON COMPANY

and

Case 9-CA-35163-1

J.A. GUY, INC.

and

Case 9-CA-35163-2

UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPEFITTING INDUSTRY OF THE
UNITED STATES AND CANADA, LOCAL 189,
AFL-CIO

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DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge. This case is before me on a stipulation by all parties that waives a hearing and asks for a decision by a judge under Section 102.35(a)(9) of the Board's Rules and Regulations. On May 16, 2003, I granted the General Counsel's motion, on behalf of all parties, to accept the stipulation, which provides that the stipulation, attached exhibits, charges, complaints and answers constitute the entire record. The General Counsel's consolidated complaint alleges that, by filing and pursuing state administrative charges and a lawsuit relating to

Charging Party Union's job targeting program, Respondent violated Section 8(a)(1) of the Act. The Respondent answered, denying the essential allegations in the complaint. The parties subsequently entered into a stipulation and, on June 16, 1999, filed a motion to transfer the case to the Board. On March 2, 2000, the Board granted the motion and accepted the stipulation. On September 26, 2002, however, the Board, noting what it considered a relevant intervening Supreme Court decision, *BE&K Construction Co. v. NLRB*, 122 S. Ct. 2390 (2002), issued an order rescinding its prior acceptance of the stipulation and remanding the case for a hearing before an administrative law judge. The parties then submitted the case to me, as mentioned above, and, on June 19, 2003, I received briefs from the General Counsel and the Respondent. Based on my consideration of the briefs, the stipulation, exhibits, and the entire record, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a mechanical contractor in the construction industry, is located in Columbus, Ohio. At all material times, it was and is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practice

A. The Facts

During the period June 1, 1989, through May 31, 1992, the Charging Party Union was signatory to a collective bargaining agreement with the Mechanical Contractors Association of Central Ohio, Inc. (hereafter the Association). At all material times, Charging Party Guy was an employer member of the Association. Under the dues checkoff provision of that agreement, Guy was required to withhold 2% from the gross wages of its employees as a "Market Recovery Assessment" for placement in the Union's Industry Advancement Fund or job targeting program.¹ The Union uses the money collected under that program to subsidize member employers who bid on jobs in competition with nonunion employers, enabling union contractors to submit competitive bids.

In February 1990, Respondent and Guy submitted bids for the construction of a new county jail for Pickaway County, Ohio. The contract for the construction of the jail was awarded to Guy. In November 1991, Respondent and Guy submitted bids for the construction of a new water softening system for Pickaway County. That contract was also awarded to Guy. Prior to the bidding on the jail project, the Union agreed to "target" the job. As a result, the Union informed union contractors bidding on the job that it would pay the successful bidder \$9 per employee-hour worked by union members

¹ The 2% Market Recovery Assessment deduction is "in addition to [the] 1¾% regular check-off dues." Exhibit A, p. 42.

on the project. Guy's low bid on the jail project was accomplished by use of the subsidy provided by the Union's job targeting program. The water softening project was not targeted by the Union and therefore Guy did not receive a subsidy for that job. It is uncontested, however, that, in accordance with the relevant provisions of the Association agreement, Guy deducted the 2% Market Recovery Assessment from the gross wages of all of its employees who worked on both jobs.²

On January 30, 1992, Respondent filed charges with the Ohio Department of Industrial Relations, alleging that the contractually required deduction by Guy for the Union's job targeting program from employees who worked on the jail and water softening system violated Ohio's prevailing wage statute and applicable regulations. On March 11, 1993, the Department issued a determination that Guy had violated the prevailing wage law.

On June 15, 1993, Respondent filed a complaint in the Pickaway County, Ohio, Court of Common Pleas (Case 93CI-94), alleging that Guy unlawfully deducted money from employees' wages on the public projects mentioned above, in order to fund the Union's job targeting program, in violation of Ohio's prevailing wage statute and an Ohio regulation prohibiting "special assessments." More specifically, the complaint alleged that since the publicly funded projects were prevailing wage jobs, under the Ohio statute and applicable regulations, Guy was required to make full payment of the prevailing wage to employees, and was prohibited from making any deductions for the Union's job targeting program. Utilizing the applicable remedial provisions of the statute and its regulations, the Respondent sought an injunction prohibiting the unlawful deductions and a reimbursement to Guy's employees of twice the difference between the prevailing wage and the amounts paid to the employees.

On July 21, 1993, Guy filed a third-party complaint in Case 93CI-94, over Respondent's objection, naming the Union a party to the lawsuit. Respondent thereafter filed a motion to strike the third-party complaint and the Union and Guy filed oppositions to the Respondent's motion. On November 5, 1993, the common pleas court denied the motion to strike.

Thereafter, Guy and the Union filed motions for summary judgment, asserting that the Respondent's lawsuit was preempted by federal labor laws. Respondent filed an opposition to those motions as well as its own cross-motion for summary judgment. On March 27, 1995, the common pleas court denied Respondent's motion for summary judgment and granted the motions filed by Guy and the Union, finding that the lawsuit was preempted by the National Labor Relations Act.³ After a timely filed appeal, on October 4, 1996, the Court of Appeals of Ohio, Fourth Appellate District of Pickaway

² The above description of the job targeting program and its operation is taken from the exhibits submitted along with the stipulation of the parties, including, in particular, the decision of the Ohio Supreme Court, which is discussed more fully below.

³ The stipulation mistakenly refers to this ruling as Exhibit T. In fact the ruling appears as Exhibit P.

County, issued a decision reversing the lower court, finding, inter alia, that the lawsuit was not preempted.

On January 29, 1998, the Ohio Supreme Court accepted discretionary appeals by Guy and the Union, and, on April 8, 1998, the Ohio Supreme Court reversed the court of appeals, finding that the Respondent's lawsuit was preempted by the National Labor Relations Act, under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Citing *Manno Electric*, 321 NLRB 278 (1996), enfd. mem., 127 F.3d 34 (5th Cir. 1997), the Court concluded: "Because the NLRB has held that job targeting is *actually* protected by the NLRA, there is no room for state regulation infringing that conduct." The Court rejected as "unpersuasive" the assertion that "*Manno* is distinguishable because it did not involve a challenge brought under a state's prevailing wage law," citing a decision of an NLRB administrative law judge,⁴ and commenting that, in *Manno*, the Board "did not limit its holding to the facts of the case before it." *Croson Co. v. Guy, Inc.*, 81 Ohio St. 3d 346, 355 (1998), cert. denied, 525 U.S. 871 (1998).

Based on separate charges filed by Guy and the Union on July 30, 1997, the General Counsel issued an initial consolidated complaint against the Respondent on January 12, 1999. An amended consolidated complaint was issued on April 2, 1999, and a further amendment correcting an erroneous date was issued 3 days later.⁵ The complaint alleged that the Respondent's legal proceedings relating to the job targeting program were "pre-empted by federal law, lacked a reasonable basis in fact and law and were retaliatory in their inception and prosecution." Respondent filed timely answers denying the allegations and raised ten affirmative defenses. In its brief to me (G.C. Br. p. 16), the General Counsel appears to have abandoned the complaint theory that the Respondent's legal proceedings lacked a reasonable basis in fact and law and were retaliatory,⁶ urging only the theory that the legal proceedings were preempted by federal law under footnote 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737(1983).⁷

⁴ The citation was to Administrative Law Judge Clifford Anderson's July 1, 1997, decision in *Associated Builders and Contractor's, Inc.* That decision was reviewed by the Board almost 3 years later; the Board's decision is reported at 331 NLRB 132 (2000). A more detailed discussion of the case appears below.

⁵ I grant the General Counsel's unopposed motion to accept formal documents. Those documents, designated Exhibit V(1) through V(12), are hereby made part of the record in this case.

⁶ The General Counsel held the processing of the charges in abeyance for over a year, until the conclusion of the state lawsuit. The General Counsel was apparently focusing on the since-abandoned theory that the lawsuit was unlawful because it lacked a reasonable basis in fact or law and was retaliatory. Under Board law before the Supreme Court's decision in *BE&K, supra*, a lawsuit was deemed to have no reasonable basis in law or fact if it was ultimately dismissed.

⁷ In footnote 5, the Supreme Court pointed out that the case before it involved a lawsuit "that the federal law would not bar except for its alleged retaliatory motivation." The Court added:

We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining

Continued

B. Discussion and Analysis

1. Prior Board decisions on job targeting

5 The lead Board case involving state lawsuits challenging union job targeting programs is *Manno Electric, supra*, 321 NLRB 278. *Manno* involved a state lawsuit that, inter alia, broadly attacked the union's job targeting program as an unfair trade practice, which wrongfully and intentionally damaged the nonunion employer who brought the
 10 suit. With Member Cohen concurring separately, the Board (321 NLRB 278 and fn. 4) summarily adopted the relevant findings of the administrative law judge. The judge found that the union's job targeting program was protected under the Act, since its objective was "to protect employees' jobs and wage scales"; and that, by "instituting and pressing the lawsuit . . . for a recovery grounded on matters preempted by the Act, the
 15 [r]espondents violated Section 8(a)(1) of the Act." 321 NLRB at 297-298. In finding the lawsuit preempted and violative of the Act, the judge discussed footnote 5 of *Bill Johnson's, supra*, 461 U.S. at 737 and the Board's decision in *Loehmann's Plaza*, 305 NLRB 663 (1991). *Ibid.*⁸

20 In *Associated Builders and Contractors, Inc.*, 331 NLRB 132 (2000), the Board again applied the *Manno* rationale to find unlawful the filing and maintenance of a state lawsuit, which was deemed similarly preempted.⁹ In that case, the respondent had filed a state lawsuit, alleging that each of the charging party unions' job targeting programs
 25 was an "unlawful, unfair and fraudulent business act or practice," under the California Business and Professions Code. The lawsuit sought to preclude application of the programs on state public work projects and asked for the disgorgement of all money deducted from employees' wages for the job training programs and other relief. In
 30 finding the state lawsuit preempted, and thus violative of Section 8(a)(1) of the Act, the administrative law judge applied *Manno* as a broad holding that job targeting programs are protected under the Act. Concluding that *Manno* was binding on him as current law, the judge deferred to the Board any argument that *Manno* should be limited to private projects. 331 NLRB at 138. He also found a violation based on the General Counsel's
 35 alternative theory that the lawsuit was preempted and unlawful under the Board's decision in *Loehmann's Plaza, supra*, 305 NLRB 663.¹⁰

40 unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act . . . [citations omitted] and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction 'where [the Board's] federal power pre-empts the field,' [citing *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, (1971)]." *Id.* at 737 fn. 5.

⁸ A more detailed discussion of *Loehmann's Plaza* follows later in this decision.

45 ⁹ The decision was vacated in part not relevant here, pursuant to a settlement. 333 NLRB No. 116 (2001).

50 ¹⁰ As indicated in the judge's decision (331 NLRB at 133-134), the state lawsuit was removed to the federal courts, and, after its removal, the Ninth Circuit held that the lawsuit was not preempted by Section 301 of the Act. See *Associated Builders & Contractors v. Electrical Workers Local 302*, 109 F.3d 1353 (9th Cir. 1997). At the time of the judge's decision, the lawsuit was "in the process of moving from the [f]ederal [c]ircuit [c]ourt to the district court and on to the [s]tate [s]uperior [c]ourt." 331 NLRB at 134.

In affirming the judge, the Board did not specifically discuss the application of *Manno* to state public works projects. A majority of the Board stated, in a footnote, that it was adopting the judge's finding of a Section 8(a)(1) violation "solely on the ground" that the job targeting program was concerted, protected activity and, under *Manno*, maintenance of the lawsuit "constitute[d] an interference with conduct that is actually protected by Sec. 7." In the absence of exceptions, the Board also adopted the judge's finding that the violation dated from the issuance of the Board's *Manno* decision. 331 NLRB at 132 fn. 1.¹¹

Some 7 months after the Board's decision in *Associated Builders*, the Board issued another decision involving job targeting programs as they applied to projects under the Davis-Bacon Act, a federal prevailing wage law. *IBEW Local 48 (Kingston Constructors, Inc.)*, 332 NLRB No. 161 (2000). The Board there held that a union violates Section 8(b)(1)(A) by threatening to have employees fired for not making job targeting payments, which the Board characterized as "MRP [market recovery program] dues," that were "owing from their employment on Davis-Bacon projects." 332 NLRB No. 161, at slip op. 10.¹² The Board reaffirmed the general rule in *Manno* that job targeting programs are "not inconsistent with public policy and are affirmatively protected by Section 7." Thus, it concluded that, since collecting job targeting payments from employees "under a union security agreement on non-Davis-Bacon jobs is not inimical to public policy," the union could properly enforce the collection of those payments as a condition of employment on those jobs. Slip op. 5. As to Davis-Bacon jobs, however, the Board found to the contrary. Without independently analyzing the impact of the Davis-Bacon Act on job targeting programs, it deferred, as "a matter of comity" to rulings of the Labor Department and holdings of two federal circuit courts that deductions for job targeting payments are not legitimate deductions under the Davis-Bacon Act. Accordingly, the Board concluded that any attempt to enforce collection of such payments would be "inimical to public policy." Slip op. 9; see also slip op. 10.

Next came *Can-Am Plumbing, Inc.*, 335 NLRB No. 93 (2001). In that case, the Board was faced with the question whether *Manno* applied where some of the money collected under the job targeting program came from Davis-Bacon and state prevailing wage jobs and the state lawsuit "broadly attack[ed] the entire job targeting program." 335 NLRB No. 93, at slip op. 1. The state lawsuit, which was stayed pending completion of the Board proceedings, alleged that a union employer's acceptance of money from the job targeting program constituted an unlawful kickback scheme or, alternatively, violated California's prevailing wage statute governing public works. The nonunion employer who instituted the lawsuit sought to enjoin acceptance of money

¹¹ In that same footnote, Member Hurtgen found a violation not under *Manno*, but under the Board's decision in *Loehmann's Plaza*, 305 NLRB 663 (1991). He therefore found that the violation dated from the issuance of the complaint.

¹² As the Board stated, the Davis-Bacon Act requires employers to pay employees the full amount of advertised prevailing wage rates, although applicable regulations permit deductions to pay regular union initiation fees and membership dues, not including fines or special assessments. 332 NLRB No. 161, slip op. 7.

under the job targeting program and further asked for “actual and punitive damages, restitution and disgorgement.” 335 NLRB No. 93 at slip op. 4.

5 The Board in *Can-Am* did not specifically address the state prevailing wage statute or its impact on the job targeting program, focusing instead on the *Kingston Constructors* holding that “unions may not lawfully exact dues from employees working on Davis-Bacon projects to support job targeting programs.” The Board held that *Kingston Constructors* did not affect *Can-Am*, because there was no evidence that the union employer involved in the state lawsuit had ever worked on a Davis-Bacon project, and, in any event, “at most only 2 to 3 percent of the funds collected for the Union’s job targeting program came from Federal or State prevailing wage jobs, and those moneys are not directly traceable to [the union employer].” 335 NLRB No. 93, at slip op. 1. Concluding that the job targeting program was therefore protected under the Act, the Board held that the state lawsuit “which broadly attacks the entire job targeting program” was preempted by federal law and thus violated Section 8(a)(1) of the Act, citing *Manno* and *Associated Builders*. 335 NLRB No. 93 at slip op. 1 and fn. 3.

20 On review, the Court of Appeals recognized the Board’s authority to enjoin state lawsuits that are preempted by federal law or that have an objective that is illegal under federal law, citing footnote 5 of *Bill Johnson’s Restaurants, supra*, 461 U.S. at 737, which the Court found was left undisturbed by the Supreme Court’s decision in *BE&K, supra*, 122 S. Ct. 2390. *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 150-151 (D.C. Cir. 2003). The Court was not ready, however, to accept the Board’s conclusion that the state lawsuit in *Can-Am* was preempted because it was directed against conduct protected by Section 7 of the Act. Rather, the Court found inadequate the Board’s justification for rejecting *Can-Am*’s contention that the union’s job targeting program was not protected because it included dues from Davis-Bacon projects. The Court stated: 30 “While the Board . . . did not treat the existence of [Davis-Bacon] moneys in the JTP [job targeting program] as wholly irrelevant, neither did it explain why the Davis-Bacon moneys did not affect the JTP’s legality or why the [u]nion’s conduct in that regard was excusable.” 321 F.3d at 153. Accordingly, the Court remanded the matter to the Board 35 for further analysis.

2. Relevant preemption principles

40 The Supreme Court in *Garmon, supra*, 359 U.S. 236, established two guidelines for federal preemption of conduct allegedly protected under the Act. Under the first guideline, when a state purports to regulate conduct that is clearly protected by the Act, state jurisdiction must yield. 359 U.S. at 244. The Court explained that to leave the states free to regulate conduct so plainly within the central aim of federal regulation would involve “too great a danger of conflict between power asserted by Congress and requirements imposed by state law. *Id.* at 244. Under the second guideline, even if activity is only arguably protected by the Act, the states “must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.” *Id.* at 245. The Supreme Court subsequently 50 qualified the second guideline to permit state regulation in cases involving arguably protected conduct, “when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means

of doing so,” provided the exercise of state jurisdiction would not “create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct.” *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202-203 (1978).

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3. Filing or maintaining a preempted lawsuit
in violation of Section 8(a)(1) of the Act

10 Addressing the legality of a lawsuit to enjoin peaceful picketing or handbilling on employer premises, the Board stated the following rule, in light of the Supreme Court’s decision in *Sears*: “(1) where arguably protected activity is involved, preemption does not occur in the absence of Board involvement in the matter, and (2) upon the Board’s involvement, a lawsuit directed at arguably protected activity is preempted by Federal labor law.” *Loehmann’s Plaza*, 305 NLRB 663, 669 (1991), reversed on other grounds, 15 316 NLRB 109, 114 (1995). Board involvement occurs upon issuance of a complaint alleging that the lawsuit interfered with protected activity. 305 NLRB at 670 and 316 NLRB at 114. But if the Board ultimately determines that the conduct in question is unprotected, the lawsuit to enjoin it will not be held to violate Section 8(a)(1) of the Act. 20 316 NLRB at 114.

The Board has cited *Loehmann’s Plaza* in cases involving lawsuits challenging aspects of job targeting programs. Since the Board found the job targeting programs clearly or actually protected, however, it dated federal preemption and interference with 25 protected activity from filing or maintenance of the lawsuits. *Associated Builders, supra*, 331 NLRB 132 at fn. 1 (in absence of exception to prospective application of *Manno Electric*, Board majority dated violation from maintenance of lawsuit after *Manno*; Member Hurtgen would have held violation did not occur until issuance of complaint, citing *Loehmann’s Plaza*); *Can-Am, supra*, 335 NLRB No. 93, slip op. 1 fn. 3 (lawsuit 30 clearly preempted and violative of Section 8(a)(1) from time it was filed).

4. Issues in this case

35 The General Counsel contends: (1) the Board has already determined, in *Manno* and *Associated Builders*, that job targeting programs are clearly protected by Section 7 of the Act; and (2) the Ohio Supreme Court has therefore correctly determined that federal law preempts Respondent’s state lawsuit challenging the job targeting deductions at issue in this case. It follows, according to the General Counsel, that 40 Respondent’s preempted lawsuit violated Section 8(a)(1) of the Act, consistent with footnote 5 of *Bill Johnson’s, supra*, 461 U.S. at 737.

45 As discussed below, in my view, Respondent’s lawsuit challenged job targeting deductions that were *arguably*, rather than *clearly*, protected by the Act. If the Board agrees with that view, it could conclude, in accordance with *Loehmann’s Plaza* and the discussion below, that Respondent’s lawsuit did not violate Section 8(a)(1) of the Act because the lawsuit was concluded before complaint issued in this case. Alternatively, the Board may wish to address whether Respondent violated Section 8(a)(1) by 50 challenging job targeting deductions from wages on two public projects, under Ohio’s prevailing wage law, in light of the Board’s decision in *Kingston* that such deductions on federal Davis-Bacon projects are inimical to public policy. I do not believe it would be

appropriate for me to address that issue of first impression concerning Board policy. Nor do I believe that the Board needs to reach it in this case, which involves state proceedings initiated in 1992 and concluded in 1998.

- 5 5. Respondent's lawsuit was narrowly addressed to conduct that was arguably, rather than clearly, protected by the Act

10 As shown, Respondent's lawsuit challenged only job targeting deductions from employees' wages on two publicly funded projects, under Ohio's prevailing wage law. By contrast, the Board's lead decision in *Manno Electric, supra*, 321 NLRB 278, involved a broadly framed attack on a union job targeting program. Although the Board, in *Manno*, did not explicitly state whether any of the job targeting funds derived from public works projects, "the decision suggests that all of the projects involved were on private sites, such as banks and department stores; the complaint did not allege that any of the money originated from public projects."¹³ In that context, the Board adopted the administrative law judge's conclusion that the lawsuit's broad attack was preempted because job targeting programs are generally protected under the Act, as their objective is "to protect employees' jobs and wage scales." 321 NLRB at 297-298.

20 The Board's subsequent decision in *Kingston Constructors, supra*, 332 NLRB No. 161, slip op. at 7-10, demonstrates that the holding of general protection for job targeting programs in *Manno* is not to be read without exception. Rather, the Board, in *Kingston*, concluded that requiring payment of job targeting dues, as a condition of employment on Davis-Bacon projects, would be "inimical to public policy." *Id.* at slip op. 9. In reaching that conclusion, the Board deferred, as a matter of comity, to federal decisions holding collections of job targeting dues on federal projects unlawful under the Davis-Bacon Act. *Id.* at slip op. 9-10. As shown below, different considerations apply in determining whether the collection of job targeting payments on public projects, contrary to state prevailing wage laws, is also inimical to public policy and therefore unprotected. Nonetheless, that is an arguable question.

35 Contrary to the General Counsel's position, that question is not answered by the Board's decision in *Associated Builders* or the Ohio Supreme Court's holding in *Croson v. Guy* that the Respondent's lawsuit was preempted. Both decisions predated *Kingston* and both treated the Board's decision in *Manno* as dispositive, without any discussion of the issues presented by applying *Manno* to block enforcement of prevailing wage laws on public projects. *Associated Builders, supra*, 331 NLRB at 132 fn. 1 and 138; *Croson v. Guy, supra*, 81 Ohio St. 3d at 352-356. *Kingston* is relevant here, even though it postdated completion of Respondent's lawsuit. Whether a lawsuit challenged protected activity and therefore violated Section 8(a)(1) is to be determined under the law as it stands when the issue ultimately comes before the Board. See *Loehmann's Plaza, supra*, 316 NLRB at 114, discussed above.¹⁴

¹³ *Can-Am Plumbing, Inc. v. NLRB, supra*, 321 F.3d at 152.

50 ¹⁴ The Ohio Supreme Court's holding does not, of course, act as a limitation on the Board's authority to determine the issues presented in this case. On the contrary, deference to the Board's broad authority to determine those issues was the guiding principle that led the Ohio

Several factors favor like treatment for federal and state prevailing wage laws in the determination whether job targeting payments in violation of those laws are inimical to public policy or unprotected. The phrasing and purposes of federal and state prevailing wage laws and regulations are similar. Compare discussion in *Kingston*, 332 NLRB No. 161 at slip op. 7-10, and *Building and Const. Trades Dept. v. Reich*, 40 F.3d 1275, 1279 (D.C. Cir. 1994), with *Croson v. Guy*, *supra*, 81 Ohio St. 3d at 349-350. States have traditionally regulated the wages paid on their public projects. Cf. *California Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 330-331, 334 (1997) (noting traditional state regulation of wages and apprenticeship standards on public works and finding no preemption under ERISA, given the “paucity of indication” of any Congressional intent to preempt). The holding of no preemption in *Dillingham* is, of course, not dispositive of the underlying preemption issue here, under a different federal statute with very different policy considerations. See *Associated Builders*, *supra*, 331 NLRB at 138. But the recognition of traditional state regulation of wages on public projects is nonetheless relevant.

Moreover, the concerted needs served by job targeting programs—to protect employees’ jobs and wage scales—are diminished on prevailing wage projects. There, the objective of “leveling the playing field”¹⁵ is to some extent achieved by the guarantee of the same prevailing wage for all. As the Ohio Supreme Court observed: “[T]he primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.” *Croson v. Guy*, *supra*, 81 Ohio St. 3d at 349 (internal citation omitted).

Nor is it a sufficient answer to say that job targeting programs generally serve the concerted objective of protecting wages and jobs. *Kingston* and *Can-Am* demonstrate that those generally protected objectives will not override prevailing wage regulation in all circumstances. *Kingston*, *supra*, 332 NLRB No. 161, at slip op. 5, 7-10; *Can-Am Plumbing*, *supra*, 335 NLRB No. 93 at slip op. 1, remanded in *Can-Am Plumbing v. NLRB*, *supra*, 321 F.3d at 152-154. It is also significant, in this respect, that the narrow focus of Respondent’s lawsuit leaves the Union’s job targeting program intact insofar as it involves private rather than public projects.

The above considerations could support a conclusion that job targeting deductions on state prevailing wage projects are unprotected, as they are on federal projects. There are, however, significant considerations on the other side. The strong policy of uniform national regulation, under the Act, may outweigh factors supporting state regulation. *Garmon*, *supra*, 359 U.S. at 242-244. It is clear that Congress, in enacting the NLRA, intended no “patchwork quilt” of regulation. *NLRB v. Natural Gas of Hawkins County*, 402 U.S. 600, 603-604 (1971), quoting from *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62-63 (4th Cir. 1965). Rather, Congress sought to avoid the “diversities and conflicts likely to arise from a variety of local

¹⁵ Supreme Court to conclude that Respondent’s state lawsuit was preempted.

¹⁵ *Can-Am Plumbing v. NLRB*, *supra*, 321 F.3d at 151.

procedures and attitudes towards labor controversies.” *Garmon, supra*, 359 U.S. at 243, quoting from *Garner v. Teamsters Union*, 346 U.S. 485, 490-491(1953).

Accordingly, deferring to federal decisions under another uniform federal statute, the Davis-Bacon Act, is sharply distinguishable from allowing prevailing wage laws in the various states to limit otherwise protected conduct under the Act. But the conflicting considerations in this case are not automatically or clearly resolved by reference to past Board decisions. In short, the underlying protected activity and preemption issues here are arguable. And since Respondent’s state lawsuit was concluded before complaint issued in this case, it did not violate Section 8(a)(1). *Loehmann’s Plaza, supra*, 305 NLRB at 669-671, and 316 NLRB at 114.¹⁶

Conclusion of Law

The General Counsel has failed to show that Respondent violated Section 8(a)(1) of the Act by filing a state lawsuit that was preempted by the Act.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended¹⁷

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. June 27, 2003.

Robert A. Giannasi
Administrative Law Judge

¹⁶ The private parties may find it unsatisfactory for the complaint in this case to be dismissed without resolution of the underlying protected activity question. The parties have waited over ten years for a definitive answer and the issue may be a source of recurring conflict between them. But the passage of time, intervening Board and court decisions, and the conclusion of the state lawsuit may have altered the landscape for the parties. Those changed circumstances could lead the Union to reexamine the wisdom of collecting job targeting payments on prevailing wage projects, whether state or federal. See *Can-Am Plumbing v. NLRB, supra*, 321 F.3d at 154 (“On remand, additional evidence may show that the Union stopped withholding Davis-Bacon dues at the time . . . [the union contractor] submitted its bid on the . . . project, or, indeed, long before that time.”) Such a reexamination could also lead to voluntary resolution of the matter, obviating the need for further litigation in this area.

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.